Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
A National Broadband Plan For Our Future	)	GN Docket No. 09-51

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ON THE USF CONTRIBUTION MECHANISM FURTHER NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

I. INTRODUCTION AND EXECUTIVE SUMMARY 1

II. GOALS OF CONTRIBUTION METHODOLOGY REFORM... 3

III. WHO SHOULD CONTRIBUTE TO THE USF? 4

IV. HOW CONTRIBUTIONS SHOULD BE ASSESSED 9

A. A revenues-based mechanism should be maintained and improved. 9

B. The Commission should not assess contributions based on connections. 19

C. The Commission should not assess contributions based on numbers. 20

D. The Commission should not adopt a hybrid contribution mechanism. 21

V. THE COMMISSION SHOULD NOT ALLOW CONTRIBUTORS TO PASS-THROUGH CONTRIBUTIONS AS A LINE ITEM ON CUSTOMERS BILLS; IF PASS-THROUGH IS ALLOWED, LINE ITEMS MUST BE CLEAR AND UNIFORM. 22

VI. THE COMMISSION SHOULD EXEMPT LIFELINE CUSTOMERS FROM PAYING A USF ASSESSMENT. 23

VII. CONCLUSION 24

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I. INTRODUCTION AND EXECUTIVE SUMMARY

As the Federal Communications Commission ("FCC" or "Commission") acknowledges, it has been considering changes to the universal service funding ("USF") contribution mechanism for over a decade.[1] In that time, little has been done, at least in terms of major structural reform. Perhaps that is partly because the current mechanism, which bases USF contribution on carriers' revenues, despite problems,[2] ***works***, especially **as a gauge of how the network is used**. The proposed substitutes for the revenues-based mechanism – basing assessments on telephone numbers or on "connections" – charge companies and customers USF contributions for mere **access** to the network.

[1] Further Notice of Proposed Rulemaking, FCC 12-46 (rel. April 30, 2012) ("FNPRM"), FNPRM, ¶ 21.

[2] By and large, the problems have been exaggerated by some in the industry; at least they have not been sufficient to force the FCC to make major changes

The past changes to the contribution mechanism have been largely due to consumers' evolving use of the telecommunications network[3]: recognizing the growth of wireless services, and accepting the "any-distance" marketing of that service, to set a standard for the interstate revenues on which the federal USF contribution mechanism must be based[4]; as well as recognizing the growth of interconnected voice over Internet protocol ("VoIP") service, the any-distance marketing of VoIP, and, similarly, setting a standard benchmark (or "safe harbor") for VoIP interstate revenues.[5]

With the Commission's recent changes to the USF, as reflected in the *USF/ICC Transformation Order*,[6] however, the Commission has for the first time decided to explicitly support broadband service.[7] This drives the current need to have broadband service **contribute** to the USF[8]; otherwise broadband service will be supported by traditional voice service, which, according to the Commission, will eventually no longer receive support.[9] Requiring voice service to be the sole support of a fund supporting broadband service would not only be unreasonable from a public policy perspective, but it would be financially unsustainable. Quite apart from all other considerations – which are many – this issue of requiring voice to contribute

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[3] See FNPRM, ¶¶ 3, 18-19.

[4] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 417-18, 428 (5th Cir. 1999) (*TOPUC*).

[5] See FNPRM nns. 19 and 40.

[6] *See Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order and FNPRM*), *pets. for review pending sub nom. In re: FCC 11-161,* No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[7] See *USF/ICC Transformation Order*, ¶ 205 (rural carriers use of USF for broadband)

[8] On June 25, 2012, NASUCA adopted a resolution to this effect. A copy of the resolution is attached to these comments.

[9] *USF/ICC Transformation Order*., ¶ 11.

to the USF (which supports broadband) while excusing broadband service from any support obligation, is the major theme of these comments by the National Association of State Utility Consumer Advocates ("NASUCA").[10] Unfortunately, the FNPRM does not address at any length the implications of this sea change in the USF.[11]

Other themes in these comments include:

- The question of how revenues should be assessed, including the merits of the revenues-based compared to the problems with a numbers- or connections-based mechanism, or a hybrid among them (as previously argued by NASUCA and others); and
- The question of whether and how providers that are assessed USF contributions are able to pass those contributions to their customers;
- The Commission should not assess Lifeline customers for USF contributions.[12]

II. GOALS OF CONTRIBUTION METHODOLOGY REFORM

The Commission notes that "many parties have suggested that [its] overarching objectives should be to simplify compliance and administration, maintain competitive neutrality,

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[10] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. These comments were prepared with the assistance of David C. Bergmann, of Telecom Policy Consulting for Consumers, Columbus, Ohio.

[11] See, e.g., FNPRM, ¶ 1.

[12] In these initial comments, NASUCA does not address Sections V.A.4.-7. (¶¶ 143-218) and VI. (¶¶ 342-386) of the FNPRM. NASUCA does reserve the right to address these issues on reply, if necessary.

and ensure long term sustainability of the Fund to achieve our objectives of ensuring that robust and affordable voice and broadband services are available to Americans across the nation."[13] **This omits a crucial objective: to ensure fairness for the customers who pay for the Fund**. Indeed, the Commission's discussion of "fairness"[14] treats fairness for customers almost as an afterthought, which is deeply disturbing. One of the key aspects of fairness to customers, in fact, is "to create an improved system that will adapt to market changes and stabilize the contribution base."[15]

NASUCA agrees that efficiency should be *a* goal of the contribution mechanism.[16] But that efficiency should not come at the expense of the other objectives: fairness to consumers and competitors, and sustainability. In principle, NASUCA agrees that "one goal for reform should be to make compliance with and administration of the contribution system more efficient (1) by developing rules that operate clearly within the evolving structure of the marketplace, and (2) by closing loopholes."[17] As discussed below, this goal can be met by the definitional rules and by safe harbors that recognize the differences among services.[18]

III. WHO SHOULD CONTRIBUTE TO THE USF?

Buried in a footnote in the FNPRM is a commonsense statement from a scholarly work: "The economics literature suggests that market distortions in a revenues-based system could

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[13] FNPRM, ¶ 22.

[14] Id., ¶ 23.

[15] Id., ¶ 25.

[16] Id., ¶ 23.

[17] Id.

[18] See id.

potentially be reduced by including the broadest set of services in the contribution base and by assessing competing services at the same rate."[19] NASUCA heartily agrees with this statement on the basis of economics and of fundamental fairness, particularly since the fund will now be targeted to support broadband.

The Commission similarly states: "Some aspects of today's contributions methodology may result in competitive distortions because different contribution obligations may apply to similar services depending on how a service is provided."[20] And further,

> In light of these problems, we propose that one goal for reform should be to make compliance with and administration of the contribution system more efficient (1) by developing rules that operate clearly within the evolving structure of the marketplace, and (2) by closing loopholes.[21]

Again, NASUCA strongly agrees with the Commission's intentions; indeed, if it is true that "the USF contribution base … has recently begun to shrink as residential and business customers have begun to migrate to communication services that do not contribute to the Fund..."[22] then it is especially important to develop "future-proof" rules that include the services to which customers have migrated. The "loopholes" that contain those services must be closed.[23]

The Commission says that it seeks

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[19] Id., fn. 184, citing N. Gregory Mankiw, Matthew Weinzierl, and Danny Yagan, "Optimal Taxation in Theory and Practice," J. ECON. PERSP, Vol. 23, No. 4, Fall 2009, at 164-165. As discussed below, the fact that numbers- and connections-based mechanisms do not include the broadest set of services, and do not assess competing services at the same rate, represents a major disadvantage of those mechanisms.

[20] FNPRM, ¶ 4; see also id., ¶ 8.

[21] Id., ¶ 21.

[22] Id., ¶ 4. Clearly, there are other reasons for the (recent – 2008 to 2011) decline in the contribution base, including the nationwide economic downturn. See also id., ¶¶ 19-20.

[23] The Commission describes current entities that are excused from contributions. Id., n. 20. NASUCA is not suggesting any changes to this list of "providers of interstate telecommunications that generally do not compete directly with common carriers." Id., ¶ 9.

> comment on two alternative approaches to defining what services or providers should be subject to contribution obligations: (1) using our permissive authority, and/or other tools to clarify or modify on a service-by-service basis whether particular services or providers are required to contribute to the Fund; or (2) adopting a more general definition of contributing interstate telecommunications providers that could be more future proof as the marketplace continues to evolve.[24]

NASUCA submits that these two methods are not mutually exclusive, but should be combined: The Commission should adopt a general definition that will be more future-proof as the marketplace continues to evolve; **and** that general definition should be supported by a non-exhaustive service-by-service list of particular services and providers that are required to contribute to the fund.[25] As the Commission notes, "Such a rule could potentially produce a more sustainable contribution system by avoiding the need to continually update a list of specific services subject to assessment."[26]

This approach allows the Commission to utilize both prongs of its authority under 47 U. S. C. § 254(d): that is, the provision that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service..." **and** "the broader, permissive authority to assess contributions, such that '[a]ny other provider of interstate telecommunications may be required

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[24] Id., ¶ 5.

[25] Id., ¶73. Clearly, interconnected VoIP should be on that list. Id., ¶ 80. Likewise, machine-to-machine services should also be included, as they benefit from a more-ubiquitous network. See id., ¶ 87.

[26] Id., ¶¶ 74, 77, 78.

to contribute to the preservation and advancement of universal service if the public interest so requires.'"[27] Similarly, the current system relies on both prongs.[28]

The public interest requires the broadest lawful class of contributors to the USF: Those who benefit from a ubiquitous national network should contribute to the Fund, with as few exceptions as feasible. This leads to the conclusion that, if the USF is to support broadband, then broadband must support the USF. The Commission notes "the U.S. Court of Appeals for the Fifth Circuit has explained [that] 'Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service.'"[29] Thus the universal service "scheme" should and must include providers of "retail broadband Internet access services" rather than just the few providers of '"stand-alone broadband telecommunications services [offered] on common carrier basis'" as is the case now.[30]

The Commission notes that "[s]everal parties …. have expressed concern that assessing broadband Internet access could discourage broadband adoption."[31] The issue is clearly one of considering the alternatives: Especially given the vagaries of broadband pricing and the market move to broadband, the notion that assessing broadband service to pay for supporting broadband

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[27] Id., ¶ 7.

[28] Id., ¶ 9.

[29] Id., ¶ 8, quoting *TOPUC*, 183 F.3d at 428.

[30] FNPRM, ¶ 10. This is not the time or the place to debate the propriety of the Commission's decision to classify retail broadband Internet access as an information service, or of the Commission's decision that the USF can support such services. Suffice it to say that NASUCA has not changed its position on either issue. The instant comments are submitted based on the assumption that the Commission has committed to supporting broadband through the USF; if that occurs, then broadband must contribute to the USF.

[31] Id., ¶ 67, citing Letter from S. Derek Turner, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, at 2 (filed Aug. 10, 2010) (Free Press Aug. 10, 2010 *Ex Parte* Letter); NCTA Aug. 20, 2010 *Ex Parte* Letter at 2.

(including voice over broadband) will suppress broadband subscription seems almost silly. On the other hand, if the FCC does not assess broadband to provide support for broadband services, that means that other services (including the supposedly "dying" POTS), will be assessed to support broadband services. That is **not** competitive neutrality!

The Commission asks, "If the Commission does assess broadband Internet access service, … should the Commission assess all forms of broadband Internet access, including wired (including over cable, telephone, and power-line networks), satellite, and fixed and mobile wireless?"[32] NASUCA's answer to this question is a resounding YES! There is no reason to exempt any form of broadband Internet access from USF contributions; indeed, to do so would be anti-competitive.

Under NASUCA's approach, all of the services that are currently assessed would continue to be assessed,[33] and others would be added.[34] Thus the contribution base would grow.

NASUCA agrees that it is "in the public interest to exercise permissive authority over a provider of telecommunications if the telecommunications is part of a service that competes with or is used by consumers or businesses in lieu of telecommunications services that are subject to assessment…."[35] This is in the public interest both for pro-competitive reasons **and** because all

[32] FNPRM, ¶70. This includes both mass market and enterprise broadband Internet access services. Id.

[33] E.g., interconnected VoIP. See id., ¶ 80.

[34] E.g., broadband Internet access service.

[35] Id., ¶ 35. This includes services that "replace, partially or wholly, services that are subject to mandatory assessment…." Id.

such services benefit from the existence of the network that the USF is designed to support.[36] NASUCA sees no reason why "the public interest analysis [should] differ depending on whether we are considering consumer services or business/enterprise services…."[37]

Based on these considerations, NASUCA supports the adoption of the rules set forth in paragraphs 40[38] 58, and 75.[39] (NASUCA also supports other rules, as discussed below.)

IV. HOW CONTRIBUTIONS SHOULD BE ASSESSED

A. A revenues-based mechanism should be maintained and improved.

The current revenues-based mechanism has been under attack for years. For almost that long, NASUCA has defended the mechanism. In an ex parte letter in 2010,

> NASUCA reiterated its long-held opposition to a change to a numbers-based or connections-based contribution mechanism; among the reasons for the opposition are the lack of need for a change; the impact of the change on low-use customers; the costs of the change to a new mechanism; and the difficulty of designing a new mechanism that is equitable. Given the numerous requests for exemption from or special treatment under a numbers- or connections-based mechanism, such a mechanism would likely be as complicated and subject to claims of arbitrage as the current mechanism. The same problems would be present with a hybrid mechanism, but would be even more complex. [40]

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[36] The Commission previously referred to entities that benefit from the public switched telephone network ("PSTN") (id.), but as the network has expanded to include broadband service, so must the class of entities that benefit from than expanded network.

[37] Id. Especially given the difficulties of differentiating between such services. See id., ¶ 70.

[38] NASUCA submits that one-way VoIP should be classified as a telecommunications service. See id., n. 167. Regardless of its classification, however, one-way VoIP should be assessed for the USF, which means that the exercise of forbearance is not necessary. Id.

[39] NASUCA agrees that this rule would properly assess non-facilities based providers for the USF. See id., ¶ 83.

[40] CC Docket 06-122, NASUCA ex parte (September 7, 2010) at 1-2. Unless otherwise stated, further references are to NASUCA filings in CC Docket No. 06-122, which may also have been filed in other dockets. Other NASUCA oppositions to the abandonment of the revenues-based mechanism include NASUCA ex parte (August 30, 2010); NASUCA ex parte (July 23, 2009) (listing some previous NASUCA filings on this issue); NASUCA Reply Comments (December 22, 2008) at Chart 2 and pp. 28-33; NASUCA Comments (November 20, 2008) at 39-41; NASUCA ex parte (October 28. 2008) at 2; NASUCA ex parte (October 27, 2008) at 2. NASUCA ex parte (October
(continued…)

Those concerns and conclusions remain valid today.

The Commission states, "The record is mixed on whether we should make modifications to our existing revenues-based system, or move to an alternative system such as connections or numbers."[41] It would be surprising if the record were not mixed on this issue.[42]

As NASUCA has shown, past growth in the revenues-based contribution percentage has been almost entirely the result of loopholes in the USF, not any shrinkage in the revenue base.[43] Now that the Commission has adopted a budget for the Fund,[44] this issue should not be a major concern.

In the past, the two main arguments against the revenue-based mechanism have been the supposed decline in interstate revenues and the supposed complications of calculating the revenues from new telecommunications services and bundles of services introduced by carriers and being adopted by consumers. Neither of these arguments holds any substantial weight.

The continual and long-standing complaints from industry about the decline in revenues have been mostly false, as the Commission's own data show.[45] Those data do show a decline **in**

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1, 2008) at 6-10; NASUCA ex parte (August 5, 2008); NASUCA Comments to Refresh the Record (July 7, 2008) at 21-24; NASUCA ex parte (January 11, 2008) (including previous NASUCA resolution).

[41] FNPRM, ¶ 96, citing *e.g.*, XO Sept. 17, 2010 *Ex Parte* Letter at 7 (arguing for improving the revenues-based system); NASUCA Sept. 7, 2010 *Ex Parte* Letter at 1 (same), *with* Verizon Aug. 13, 2010 *Ex Parte* Letter (arguing for a numbers-based system); NCTA Aug. 20, 2010 *Ex Parte* Letter (same); WildBlue Sept. 9, 2010 *Ex Parte* Letter, Attach. at 3 (arguing for a connections-based system).

[42] As it most often is in Commission proceedings. See generally *USF/ICC Transformation Order*.

[43] See NASUCA ex parte (October 1, 2008) at11-16.

[44] FNPRM, ¶ 30.

[45] See id., ¶ 20 and Chart 1. NASUCA's ex partes showed the falsity of the industry allegations. See NASUCA ex parte (October 1, 2008) at11-16.

the contribution base since 2008.[46] But the cause of that decline is not clear. It may be, as noted above, due to the nationwide economic downturn in that period.[47] The Commission notes, however, that "total revenues reported to the Commission by communications firms grew from $335 billion in 2000 to more than $444 billion in 2010."[48] Thus the reasonable conclusion is not that revenues are an inappropriate basis for calculating contributions to the USF, but simply that **not enough revenues are included in the contribution base.**[49] Especially with the inclusion of broadband revenues in the base, any problem with the size of the contribution base should be alleviated.[50] The addition of additional revenues to the contribution base would — *ceteris paribus*[51] — reduce the contribution factor.[52]

Industry complaints about the difficulties of segregating revenues are addressed by the Commission's adoption of "safe harbor" factors for particular services. Currently,

> wireless providers and interconnected VoIP service providers may use safe harbors or traffic studies to allocate their revenues. The safe harbors allow contributors to designate the following percentages of revenues (for the categories indicated) as interstate/international: paging services, 12 percent; wireless services, 37.1 percent; and interconnected VoIP services, 64.9 percent.[53]

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[46] See FNPRM, Chart 1.

[47] Indeed, to the extent that these lower revenues represent lower usage of the network and the services provided over the network, the reductions make sense.

[48] Id, ¶ 13.

[49] Notably, the growth in overall revenues tracks closely to the growth in connections. See id., Chart 6.

[50] See id., ¶ 71. See also , e.g., http://www.statista.com/statistics/214234/us-broadband-service-revenue-since-2002/ (U.S. broadband revenue was $36.8 billion in 2011); "Infonetics: Mobile Broadband Revenues to double," http://viodi.com/2010/07/15/infonetics-mobile-broadband-revenues-to-double-hspa-drives-card-sales/

[51] That includes not increasing the size of the Fund.

[52] See FNPRM, ¶¶ 69, 93.

[53] Id., ¶ 123, citing *Wireless Safe Harbor Order*, 13 FCC Rcd at 21259, para. 14 (setting a 12% safe harbor for paging providers); *2006 Contribution Methodology Order*, 21 FCC Rcd at 7532, para. 25 (setting a 37.1% safe harbor for wireless telephony providers); *id.* at 7545, para. 53 (setting a 64.9% safe harbor for interconnected VoIP (continued…)

Similar safe harbors can and should be adopted for other categories of services, e.g., "providers of enterprise communications services that include interstate telecommunications; text messaging; one-way VoIP; and broadband Internet access services."[54]

As the Commission states,

> If a contributor relies on an established safe harbor, the contributor's allocation of interstate/international revenues is presumed reasonable. Wireless and interconnected VoIP service providers also are free to allocate revenues based on a ratio derived from a sample of traffic in the relevant reporting period, also known as a traffic study. If such a provider chooses to allocate its end-user telecommunications revenues using a traffic study, it must submit that study to the Commission. Whatever their choice, contributors are required to decide whether to report either actual or safe harbor revenues for all of their affiliated legal entities within the same safe harbor category.[55]

There has been no showing that the current process allowing for traffic studies and safe harbors has not been effective, just as there had been no showing under the earlier complaints about the revenues-based mechanism that dividing bundles was difficult if not impossible.[56]

The Commission discusses the fact that — for the carriers that choose not to use the safe harbors and have submitted traffic studies — their traffic studies show interstate/international

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service providers); *see also Universal Service Contribution Methodology et al.*, WC Docket No. 06-122, Declaratory Order, 23 FCC Rcd 1411, 1417-18, paras. 13-15 (2008) (*Traffic Study Toll Allocation Order*).

[54] FNPRM, ¶38 (footnotes omitted)

[55] Id., ¶ 12 (footnotes omitted).

[56] See id., ¶¶ 19, 102. Such a process may or may not be legally required (id., ¶ 138) , but would certainly be a reasonable exercise of the Commission's authority. NASUCA does agree that the Commission should "codify specific requirements [and] provide greater detail in the Form 499 instructions for how traffic is categorized in traffic studies to ensure that reporting entities are conducting the studies in a competitively neutral manner…." Id., ¶ 141.

revenues significantly lower than the safe harbor.[57] Two immediate comments come to mind: First, obviously these carriers **can** produce traffic studies that differentiate between intrastate and interstate traffic, making the pleas of other carriers that they cannot produce such studies simply not credible. More specifically, however, the statements of those ten or so wireless carriers[58] and almost fifty VoIP providers[59] that claim **no** interstate usage lack credibility.[60]

Fundamentally, only a carrier that believed (or wished to assert) that its interstate traffic was below the safe harbor would submit a traffic study.[61] The carriers that had interstate traffic **in excess of the safe harbor** would not bother to submit such studies. Thus the only logical conclusion is that the safe harbors allow some interstate traffic to go unassessed; but the simplicity of the safe harbors, amidst the acknowledged variability and uncertainty of the assignment of interstate revenues[62] are eminently reasonable for use for the federal USF contribution mechanism.

Yet the Commission states,

> The fact that there is such a wide disparity in the reported percentages for wireless and mobile providers suggests that companies may be utilizing different methods in how they classify calls in their traffic studies, which lessens predictability and may lead to competitive distortions. The lack of standards in this area may give providers an incentive "to bias any traffic studies [or good-faith estimates] to minimize their amount of interstate and international end-user revenues and

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[57] Id., ¶¶ 124-125 (wireless and VoIP).

[58] Id., Chart 1.

[59] Id., Chart 4.

[60] One wonders what degree of scrutiny is given to these traffic studies.

[61] This makes the Commission's speculation about using these traffic studies to set a standard (id., ¶135) illogical, at best.

[62] See FNPRM, ¶ 126.

> thereby minimize their Fund contributions" with "no countervailing market forces to offset these incentives."[63]

NASUCA agrees on the lack of standards, and the (improper) incentives that lack gives carriers. The answer to this problem, however, is not for the Commission to seize USF authority over all the revenues from these services. Rather, consistent with the views expressed herein, NASUCA suggests the adoption of safe harbors to alleviate these issues.[64]

The Commission intimates that "changes in the marketplace" could somehow overrule *TOPUC*'s finding that the FCC lacks authority to assess intrastate revenues for the federal USF.[65] On the other hand, the Commission seeks

> comment on whether as a policy matter we should require that revenues be allocated based on the jurisdiction that regulates the associated service. Does this construct make sense in an environment where many contributors are not rate regulated, and many of the services they offer are only lightly regulated?[66]

The law is the law; until the law is changed, neither changes in the marketplace nor changes in state and federal regulation can allow FCC exercise of jurisdiction over intrastate revenues.[67]

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[63] Id., ¶ 126, quoting *2006 Contribution Methodology Order*, 21 FCC Rcd at 7535, para. 32.

[64] The Commission should also investigate carriers whose interstate/intrastate allocations are outliers intended to evade USF obligations.

[65] FNPRM, ¶ 129.

[66] Id., ¶ 128.

[67] As noted above, the assertion of the State members of the Joint Board that TOPUC was "wrongly decided," (id. ¶ 130) is unavailing. In footnote 260 of the FNPRM, the Commission cites to. *Smith v. Ill. Bell Telephone Co.*, 282 U.S. 133, 151 (1930), asserting that "The Supreme Court recognized with respect to separations of revenues and expenses for purposes of regulated ratemaking for incumbent telephone companies many decades ago, 'extreme nicety is not required.' *Id.* at 150." But it is more than "nicety" to ignore the need to recognize the interstate/intrastate split of jurisdiction under § 254(d). The Commission notes that "[s]ince many services offered today are not priced and sold separately as intrastate or interstate service, any designated allocation between jurisdictions may be arbitrary to some extent." FNPRM, ¶ 129. Whether discussed in the context of "nicety" or of "arbitrariness," it should be clear that a decision to allocate 100% of service revenues to the interstate jurisdiction is especially arbitrary, and not particularly nice to states and their USFs.

The Commission asserts that "[i]f such a rule had been in place in 2010, *i.e.*, a rule that assesses all interstate, intrastate, and international revenues, the contribution factor would have been roughly four percent, instead of 14 percent on an annualized basis."[68] It might be that such a system would be simpler to administer,[69] but it would not be legal. In addition, from a policy perspective, the impact on states would be improper and unreasonable. First, in states that have USF funds, customers would be paying twice, i.e., customers would be assessed by the FCC and the states on the same (intrastate) revenues. State fund assessments are used to support service within the state. If the FCC assesses a surcharge on intrastate revenues, the money goes into the federal coffers. This would both unnecessarily drive up the cost to the customer and if the upshot was an effort to eliminate state funds, states that went to the effort to promote universal service within their borders would suffer. That is especially true given the FCC's "abandonment" of the PSTN, which states may decide still needs support.

The establishment of safe harbors distinguishing between interstate and intrastate traffic[70] is clearly within the FCC's jurisdiction, especially given the evident ability of carriers to perform traffic studies to distinguish between jurisdictions. The establishment of safe harbors for most services — while allowing providers that disagree with the safe harbors to present tracked data or traffic studies[71] — should simplify the revenues-based mechanism.[72] This includes the issues

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[68] Id., ¶ 131.

[69] Id.

[70] And also between telecommunications and information services.

[71] Id., ¶ 136.

[72] Id., ¶ 101.

raised by the Commission regarding bundled services.[73] NASUCA agrees that "the lack of bright-line rules may encourage providers to minimize their allocation of revenues in a bundle to assessable services to reduce their contribution obligations in order to gain a competitive edge."[74] Unfortunately, NASUCA lacks the resources to propose such specific rules for bundles, but looks forward to reviewing other parties' proposals on reply. As with the inter/intrastate safe harbors, carriers should be able to present studies that show that the safe harbor should not apply to their (and their customers') situation. Thus, NASUCA supports the rule set forth in ¶ 106.[75]

The Commission asks whether "a contribution methodology that assesses the full retail revenues of bundled services that contain 'telecommunications,' as that term is defined in the Act, without safe harbors or the ability to present individualized showings, conform to the statutory requirements."[76] The same question is asked regarding "an information service that provides interstate telecommunications…."[77] As discussed above, such an approach would violate *TOPUC*. And the assumption of authority over the entirety of bundles would be bad public policy, as well.

The Commission also notes,

> In other contexts, the Commission has recognized that Internet access services are jurisdictionally interstate because end users access websites across state lines. We seek comment whether a similar finding should be made for USF contribution purposes. Specifically, if we use our permissive authority to expand or clarify

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[73] Id., ¶¶ 103-105.

[74] Id., ¶ 105.

[75] This rule properly puts the burden on the supplier to justify differences from the safe harbor. See id., ¶¶ 107-108. This approach also minimizes competitive disparities among providers. See id., ¶ 109.

[76] Id., ¶ 113.

[77] Id., ¶ 115.

> USF contribution requirements to include enterprise communications services, text messaging services, and broadband Internet access services (both fixed and mobile), should we find that for USF contribution purposes, revenues from such services should be reported as 100 percent interstate? Alternatively, should we use an allocator lower than 100 percent interstate for contribution purposes, to preserve a revenue base that could be assessed for state universal service funds?[78]

NASUCA has consistently argued that the Commission's decision asserting that all Internet access services are jurisdictionally interstate was fundamentally flawed.[79] Hence it should not be surprising that NASUCA opposes a 100% interstate allocation for Internet access services.

The Commission also addresses whether it should assess only the telecommunications component of services that also include an information service component.[80] NASUCA submits that the line between the two components is sufficiently blurred[81] that it would be appropriate to treat the entire service as assessable for USF purposes, federal and state. Here again, the FCC should establish an interstate safe harbor, with the residual being intrastate. Thus NASUCA disagrees with the rule proposed in ¶ 117, except as a fallback if the Commission decides that the entirety of the service is not assessable.

The Commission also asks how the rule would impact the overall contributions base, as well as the individual burden on consumers.[82] The rule should ease the administration of the

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[78] Id., ¶ 333 (footnote omitted).

[79] See, e.g., *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 1007 (2005) (Scalia, J., dissenting). Arguing that an FCC decision was erroneous is a much simpler matter than arguing that an appellate court ruling (such as *TOPUC*) was wrongly decided.

[80] Id., ¶ 115.

[81] See footnote 79, supra.

[82] Id., ¶ 110.

contribution base, thus stabilizing it. Equally importantly, safe harbors protect low-use customers, and ensure that high-use customers pay their fair share.

It should be clear that another advantage of the safe harbor is that the residual percentage should presumptively be intrastate, and thus available to state USFs. For example, the current interconnected VoIP safe harbor of 64.9% leaves 35.1% of revenues assessable by states that include interconnected VoIP revenues in their USFs.

The Commission asks "[s]hould we adopt a separate allocator for each major category of service presently reported on Form 499 (fixed local services, mobile services, toll services), or should we follow a simpler approach, for instance, with just two allocation rules: one for voice and one for data services?"[83] In this respect as in others, simpler is not necessarily better. Allocators for separate categories of service will better reflect their usage; allocations based just on voice versus data are insufficiently refined for this purpose.

Which is not to say that the safe harbors should be set in stone.[84] As the Commission notes,

> In 2002 and 2006, the Commission adjusted upwards the wireless safe harbor percentage to reflect increased usage of wireless phones for placing interstate calls. In addition, in 2006, the Commission extended universal service contribution obligations to providers of interconnected VoIP services, as consumers are increasingly purchasing VoIP service instead of traditional phone service.[85]

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[83] Id., ¶ 132.

[84] Id., ¶ 136.

[85] Id., ¶ 21 (citations omitted).

The safe harbors should be reviewed — obviously more frequently and more regularly than the Commission has done up to now. NASUCA suggests a "triennial review" for the safe harbors; this examination should also include a review of whether there are new services that should have a safe harbor adopted.[86]

B. The Commission should not assess contributions based on connections.[87]

The Commission's discussion of connections-based mechanisms (FNPRM, ¶¶ 219-282) contains little new beyond what has previously been discussed, almost literally *ad nauseum*. NASUCA will, therefore, merely refer the Commission to the state advocates' previous submissions on this issue, as set forth in footnote 40 above.

As the Commission states,

> Despite several rounds of comment, the industry as a whole has not reached consensus about whether connections-based assessments are the best way to reform the contribution system: some providers have strongly opposed a connections system, others have been agnostic about whether a connections-based system is the optimal reform, and still others who once supported a move to a system that includes a connections-based component appear to be re-evaluating their position on this issue.[88]

NASUCA, whether categorized as part of the "industry" or not, maintains its opposition to a connections-based mechanism. As noted above, a connections-based mechanism — like the numbers-based mechanism addressed in the next section — unfairly assesses consumers based

[86] Another indicator for review might be if the number of carriers/providers submitting traffic studies (i.e., asserting interstate usage below the safe harbor) declines. The Form 499 filings should give guidance on this issue.

[87] Based on NASUCA's opposition to a connections-based approach, NASUCA has no initial comment on the Commission's specific proposals for implementation and rules for such a mechanism.

[88] Id., ¶ 222 (footnotes omitted).

on their access to, rather than usage of, the network. [89] And the connections-based mechanism offers many new opportunities for arbitrage.[90]

C. The Commission should not assess contributions based on numbers.[91]

Similarly, there are no substantive new arguments in favor of a numbers-based contribution mechanism. Again, it seems that NASUCA's best recourse is to refer the Commission to NASUCA's previous comments on this issue, listed in footnote 40 above. One appropriate note, however, would be a comment that, although there appear to be no numbers without connections, there are connections without numbers, making the class of connections larger than the class of numbers. More importantly, there are telecommunications revenues (and information service revenues dependent on telecommunications) that do not rely on a specific connection or number. Thus the revenue base is larger, and less amenable to evasion.

The Commission describes a numbers-based mechanism as follows: "There would be a standard monthly assessment per phone number, such as $1 per month, with potentially higher and lower tiers for certain categories of numbers based on how these numbers are assigned or used."[92] As NASUCA explained[93] and the Commission acknowledges,[94] the $1 per month was

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[89] See id., n. 371. See also id., ¶¶ 263, 269.

[90] Id., ¶¶ 249-263.

[91] Similarly to NASUCA's comments on a connections-based approach (see footnote 87, supra), NASUCA has no initial comment on the Commission's specific proposals for implementation and rules for a numbers-based mechanism.

[92] FNPRM, ¶325.

[93] NASUCA ex parte (October 1, 2008) at 9.

[94] FNPRM, ¶ 311.

entirely hypothetical, and not a necessary artifact of a numbers-based mechanism. So it can hardly be touted as a benefit of such a system.

The FNPRM makes clear, however, the arbitrage opportunities available on a numbers-based mechanism.[95] And the Commission acknowledges the likelihood that a number-based mechanism would have to be a hybrid scheme in order to capture special access and private line providers and customers.[96]

D. The Commission should not adopt a hybrid contribution mechanism.

At this point, the onus is on those proposing a change to a connections- or numbers-based mechanism to show the costs of the move to these new mechanisms.[97] The Commission now "seek[s] to develop a factual record on the regulatory compliance costs stemming from the current requirement to allocate revenue between the intrastate and interstate jurisdictions."[98] Yet the continual carping about the current mechanism has not — to NASUCA's recollection — produced any record of specific costs for a numbers-based or connections-based mechanism; there have only been vague and generic assertions about those costs.

It should be noted, however, that a "hybrid" mechanism — that is, one that retains the current mechanism for some services, but adds a connections-based or a numbers-based

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[95] See FNPRM, ¶¶ 300-309, 312-321, 329.

[96] Id., ¶ 286.

[97] Id., ¶¶ 96-97.

[98] Id., ¶ 139.

component, or both, for other services — will simply add costs.[99] A hybrid mechanism will also add opportunities for arbitrage.[100]

V. THE COMMISSION SHOULD NOT ALLOW CONTRIBUTORS TO PASS-THROUGH CONTRIBUTIONS AS A LINE ITEM ON CUSTOMERS BILLS; IF PASS-THROUGH IS ALLOWED, LINE ITEMS MUST BE CLEAR AND UNIFORM.

Contributors to the USF are permitted, but are not required to, pass-through their USF contributions to their customers as line items on the customers' bills.[101] That being said, there does not appear to be any good reason why such line items should be permitted. They make competitive comparisons among services difficult. Thus NASUCA's initial recommendation in this area is that carriers be forbidden from placing federal USF line items on customers' bills: The cost of the USF should be treated as any other cost the company incurs. Thus NASUCA supports the adoption of the rule set forth in FNPRM ¶ 394.[102]

On the other hand, if the Commission does allow USF line items on customer bills, then NASUCA strongly supports requirements that ensure clarity of that line item.[103] As the Commission states,

> In many instances, customer bills include a line item for USF, but do not indicate the USF contribution factor used to determine such line item, or the portion of the bill to which the contribution factor was applied. We seek comment on whether

[99] See id., ¶¶ 224, 322.

[100] See NASUCA filings cited in footnote 40, supra.

[101] FNPRM, ¶ 388.

[102] The FCC possesses the power to regulate line items on telecommunications customers' bills. *Nat'l Ass'n of State Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238 (11th Cir. 2006).

[103] Id.

> we should limit the flexibility currently afforded contributors in the recovery of universal service obligations or adopt measures to provide greater transparency regarding such recovery to enable consumers to make informed choices regarding their service. For example, we could adopt a rule that contributors must identify on the consumer bill the portion of the bill (whether based on revenues or another unit) that is subject to assessment. This could enable end users to determine whether they are being properly charged a USF pass-through charge.[104]

Again, if USF line items are permitted to be charged, they should be as clear and uniformly described as feasible.

VI. THE COMMISSION SHOULD EXEMPT LIFELINE CUSTOMERS FROM PAYING A USF ASSESSMENT.

The Commission asks for comment on "whether to extend to non-incumbent eligible telecommunications carriers our existing rules that preclude incumbent carriers from recovering from their Lifeline subscribers universal service contributions for Lifeline offerings."[105] As the Commission notes, "In our prior proceedings, consumer groups, large telecommunications customers, LECs, and wireless providers all supported an exemption for numbers provided to Lifeline subscribers, and no commenter opposed an exemption for numbers provided to Lifeline subscribers."[106] There does not appear to be any reason to distinguish a numbers-based mechanism from a revenues-based or a connections-based mechanism in this regard. Thus the prohibition on incumbent ETCs assessing Lifeline customers a USF contribution should be extended to all carriers that offer Lifeline. NASUCA supports the rule set forth in the FNPRM, ¶ 404.

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[104] FNPRM, ¶ 390.

[105] Id., ¶ 5.

[106] Id., ¶ 317 (citations omitted).

Especially given the Commission's adoption of a uniform $9.25 Lifeline discount,[107] it makes little sense to extend the discount to Lifeline customers and then take part of that discount away in the form of a USF surcharge.[108] As the Commission notes, there are approximately 14.8 million Lifeline subscribers.[109] The dollars come from and go to the same pot, the federal USF. Thus whatever contribution mechanism is adopted, Lifeline customers should be exempt from the USF contribution.

VII. CONCLUSION

NASUCA appreciates the opportunity to comment on the USF contribution mechanism, and looks forward to the reply cycle. At this point, NASUCA urges the Commission to:

- Require all providers that benefit from the network to contribute to the USF;
- Retain the numbers-based contribution mechanism, with the revenue based expanded to include the providers discussed here;
- Not assert jurisdiction over intrastate revenues;
- Establish, to the extent feasible, safe harbors for services to establish the level of interstate/international revenues;
- Prohibit USF line items on customers' bills, or failing that, ensure that line items are clear and uniform; and
- Prohibit providers from assessing Lifeline customers for USF contributions.

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[107] Id., ¶ 403.

[108] The new $9.25 Lifeline discount already reflects a decrease for many Lifeline customers who had received up to $13.50 under the prior tiered Lifeline discount scheme.

[109] Id., ¶ 417.

Respectfully submitted,

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THE NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES

RESOLUTION 2012-03

Supporting the adoption of federal universal service support contribution mechanisms that ensure all carriers and services that benefit from high cost universal service funding contribute to the program's funding base.

WHEREAS, Incumbent Local Exchange Carriers (ILECs) are redesigning and rebuilding their networks so that they may provide telecommunications, broadband and video services directly to subscribers over their local facilities, including the facilities that are the functional equivalent of the local loop; and

WHEREAS, the Federal Communications Commission (FCC) issued a November 18, 2011 Order that fundamentally alters federal high cost universal service support by first reducing, then eliminating in its entirety, support for voice telecommunications service and, instead, targeting all federal high cost subsidy funds to support broadband service; and

WHEREAS, the FCC's decision to direct all federal high cost subsidy support to broadband service will provide further incentives to ILECs to modify their networks to offer broadband service; and

WHEREAS, the design of telecommunications networks, and therefore the costs of these networks, is now driven by the desire and need to provide broadband and video services so that ILECs and other voice service providers may offer bundles comprised of voice, broadband and other services; and

WHEREAS, The Telecommunications Act of 1996 requires that services included in the definition of universal telephone service bear no more than a reasonable share of joint and common costs of facilities used to provide those services; and

WHEREAS, voice telephone service has been designated by the Federal State Joint Board on Universal Service and the FCC as universal telephone service and, as such, is subject to the surcharges that will be used to support broadband if the FCC's Order stands;

NOW THEREFORE, BE IT RESOLVED, that NASUCA urges the FCC to adopt a contribution mechanism requiring carriers and services that benefit from high cost universal service funding to contribute to federal universal service funds.

BE IT FURTHER RESOLVED, that the Telecommunications Committee of NASUCA, with the approval of the Executive Committee of NASUCA, is authorized to take all steps consistent with this Resolution in order to secure its implementation.

Adopted: June 25, 2012
Charleston, South Carolina
Submitted by the Telecommunications Committee
Abstention: Michigan